STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
CESAR POSADA and MAXIMO RAMIREZ,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2003CF2067
	)	2003CF2068
	)	EEOC NO(S): 21BA31034
	)	21BA31035
and	)	ALS NO(S): 04-266C
	)	
THE PAMPERED CHEF, LTD.,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION)

Entered this 1st day of April 2011

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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	)	
Respondent.	)	**Judge William J. Borah**

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing held on April 13th and April 14th, 2010. Complainants and an agent of Respondent were present, as well as their attorneys. Both parties have filed post-hearing briefs and replies.

The Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following facts are those which were determined to have been proven by a preponderance of the evidence at the public hearing on his matter. Assertions made at the public hearing which are not addressed herein were determined to be unproven or were determined to be immaterial to the decision.

1. Respondent, The Pampered Chef, Ltd., hired Complainant, Cesar Posada, on March 11, 1996. His country of national origin is Mexico.

2. Respondent hired Complainant, Maximo Ramirez, on February 19, 1997. His country of nation origin is Mexico.

3. Respondent employed Complainants as forklift drivers. Complainants worked in

Respondent's warehouse as part of the Shipping and Receiving Department located at its Rohlwing Distribution Center in Addison, Illinois.

4. Respondent maintained an Equal Employment Opportunity policy, an Open Door policy, a Policy Against Sexual Harassment and a Non-Harassment Policy. Complainants received copies of these policies at the start of their employment and participated in related training throughout their employment.

5. Respondent had a Human Resources office located at the Rohlwing Distribution Center.

6. In 2002, Complainants' immediate supervisor was Terry Tully, Operations Supervisor. Tully reported to the Distribution Center Manager, Jeff Annunzio, who reported to James Homoly. James Homoly held the position of Director of the Rohlwing Distribution Operations and Corporate Facilities.

7. In 2002, Tully supervised Respondent's forklift drivers, which included the Complainants, and Cherisse Tyminski, its Shipping and Receiving Clerk.

8. Respondent conducted monthly employee celebratory parties hosted by its Human Resources Department. These parties were attended by an estimated 150 employees. Music was played and food was served. They took place in an open area of the 350,000 square foot warehouse. James Homoly, Complainants, employees from Respondent's Human Resource Department, and employees from the Shipping and Receiving Department were among those who attended the monthly parties.

9. From January 2002 through January 8, 2003, the Shipping and Receiving Department consisted of eleven employees, nine of whom were Hispanic.

10. Complainant, Posada, received ratings of "very good" on his last two performance evaluations in May 2001 and May 2002, and, as a result, he received wage increases.

11. Complainant, Ramirez, received ratings of "very good" on his last two performance

evaluations in December 2001 and December 2002, and, as a result, he received wage increases.

12. In October 2002, Complainants lodged a complaint with their immediate supervisor, Terry Tully, about the behavior of Cherisse Tyminski, the Shipping and Receiving Clerk.

13. After Complainants' October 2002 meeting with Tully, Complainants had no further complaints about Tyminski's behavior.

14. In 2002, Respondent conducted an internal investigation regarding the theft of its products at its shipping and receiving warehouse. Complainants, along with all of the other warehouse employees, were under investigation of theft and subjected to added security measures.

15. Respondent terminated both Complainants' employment on January 8, 2003.

16. Respondent first became aware of Complainants' allegations of national origin harassment when it was served with their charges of discrimination. At the time of service, Complainants had been terminated from their employment with Respondent.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.

2. At the time of the incidents complained of, Complainants were employees as defined in Section 2-101(A) of the Illinois Human Rights Act ("Act").

3. At the time of the incidents complained of, Respondent was an employer as defined in Section 2-101(B) of the Act.

4. At the time of the incidents complained of, James Homoly was a supervisor.

5. At the time of the incidents complained of, Cherisse Tyminski was not a supervisor.

6. Complainants have failed to establish a *prima facie* case of national origin discrimination. Complainants failed to show by the preponderance of the evidence that harassment occurred or that it was severe and pervasive enough to alter the conditions of their employment and created a hostile and abusive working environment.

INTRODUCTION

Complainants' Summary of Factual Allegations

During 2002, James Homoly was Director of Respondent's Rohlwing facilities in Addison, Illinois. From July, 2002, through December, 2002, Homoly cast out disparaging slurs in hearing range of Complainants and other employees whose national origin was Mexico. On seven occasions, Complainant Posada overheard Homoly say a combination of the following remarks, "all Mexicans are thieves," and, "Why don't they [Mexicans] learn fucking English." These remarks were said either in Respondent's shipping and receiving warehouse or at its monthly employee parties. Along with these remarks during the five month span, Homoly, on occasion, would fail to greet the Complainants and also "glare" at them while working.

Complainants also alleged that they were illegally harassed from August 2002 through October 2002 by Cherisse Tyminski, Respondent's shipping and receiving clerk. On occasion, Tyminski was instructed by Tully to relay work orders or instructions to the work crew, and direct them as if she was their supervisor. Thus, Complainants alleged she held the legal status of supervisor for the purpose of liability.

In addition, during this period, Tyminski, in hearing range of Complainant Posada said, "stupid Mexicans" and "Mexican motherfuckers" on four separate occasions. Tyminski also allegedly proclaimed four times in a voice loud enough to be overheard, "I don't know why you (Mexicans) don't speak English." A meeting with Tully was demanded by the Complainants and another employee to discuss Tyminski's behavior. After the meeting, Complainants did not complain about Tyminski's behavior again.

Respondent's Summary of Factual Contentions

Respondent denies that either Homoly or Tyminski made any derogatory remarks based on Complainants' national origin, Mexico.

Respondent argued Complainants' testimonies were not credible because: 1) Complainants failed to allege any harassment until after their discharge of January 8, 2003,

despite their knowledge of, and past use of, Respondent's grievance procedure, 2) Complainants' testimonies at the public hearing contradicted past statements and, 3) Complainants' lack of any corroborating witness, despite the public locations, the number of listeners, and the broadcast and loud pronouncements of the alleged derogatory remarks by both Homoly and Tyminski. Respondent further contends that, even if the allegations of the Complainants are presumed to be true, those remarks did not rise to the level of actionable harassment.

Respondent also contends Tyminski was a coworker and not a supervisor for the purpose of liability under the Act. Tyminski was a clerk and her duties were limited. Therefore, Complainants failed to follow Respondent's internal policy and procedure to address such harassment.

In any respect, in October 2002, Complainants, plus other employees, demanded and were granted a meeting with Tully, their immediate supervisor, concerning the behavior of Tyminski. No mention of Tyminski's alleged derogatory remarks was brought up during this meeting, only that she was "too bossy." Three employees attended the meeting, including Complainants. Respondent contends that, even if the issue of harassment was advanced during the meeting, the Complainants had no further complaints concerning Tyminski after the October 2002 meeting; thus, the matter was resolved satisfactorily as required by the Act, and no basis for employer liability exists.

HARASSMENT STANDARD

Complainants must prove by the preponderance of the evidence that they have been harassed in order to prevail under the Act. Complainants have the burden of establishing a *prima facie* case. To establish a *prima facie* case of national origin harassment, Complainants must demonstrate: 1) they were subjected to unwelcome harassment; 2) the harassment was based on their national origin; 3) the harassment was severe and pervasive enough to alter the conditions of their employment and create a hostile and abusive working environment; and 4)

there is a basis for employer liability. Beamon v. Marshall & Lisley Trust Co., 411 F.3d 854 (7th Cir. 2005).

In Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission, 184 Ill.App.3d 350, (1st Dist. 1989), an analysis was used as to the quality and quantity of the alleged torment: "Racial harassment (and national origin harassment) has been defined to include a steady barrage of opprobrious racial comments. . . More than a few isolated incidents of harassment, however, must have occurred; racial comments that are merely part of casual conversation, are accidental, or are sporadic do not trigger civil rights protective measures." Additional information is needed here factually; as we "...must consider all of the circumstances...." Id. A decision must include a review of the "frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."

The burden of proof is borne by both Complainants, individually and separately.

FACTUAL BACKGROUND

Preliminary Facts

Cesar Posada was hired by Respondent on March 11, 1996, and Maximo Ramirez on February 19, 1997. Both Complainants are from Mexico. During the time of the alleged incidents, July 2002 through December 2002, Complainants were forklift drivers. Complainants worked in the warehouse of the Shipping and Receiving Department at the Rohlwing Distribution Center in Addison, Illinois. Respondent's Human Resource Department was located at the Rohlwing Distribution Center.

From Complainants' initial employment, Respondent had a "non-harassment" policy and internal procedures available to employees who believed they were subjected to harassment, as well as other acts of discrimination. Respondent's written policies and procedures were given to Complainants at the start of their employment, and throughout their employ, Respondent

continued to instruct Complainants on these policies. In fact, Complainants used one of the internal procedures to complain about a clerk's behavior in October 2002.

Respondent, through its Human Resources Department, hosted monthly parties to celebrate its employees' birthdays and anniversaries. The events were attended by an estimated 150 employees, including "all of shipping." Music was played and food served. The parties would take place in an open area in the warehouse. Management also attended, including Homoly, the director of the facility.

January 2002 through January 2003, the Shipping and Receiving Department consisted of eleven employees, nine of whom were Hispanic. For the same time period, Company-wide, over 80% of the Forklift Drivers, or 26 of the 32, were Hispanic. No information was given as to those employees from Mexico.

Complainant's immediate supervisor was Terry Tully, Operations Supervisor. Tully also supervised Cherisse Tyminski, clerk, who was responsible for the accuracy of inventory, shipments, and the scheduling of trucks. Tyminski communicated to the forklift drivers including the Complainants and the "lead man." Tyminski did not have the authority to hire, schedule or discipline employees. Tully reported to the Distribution Center Manager, Jeff Annunzio, who reported to James Homoly. The Complainants knew Homoly since the start of their employment in 1996 and 1997 with Respondent, first in his supervisory role, before his advancement to directorship of the location. Complainants' relationship with Homoly was "nice," but in "mid-2002" Homoly's demeanor changed toward them.

Both Complainants received the rating of "very good" on their last two performance evaluations in 2001 and 2002, and received wage increases.

Respondent had a theft problem in the warehouse area in 2002 and it initiated preventive measures that included all employees. Complainants were aware that they were implicated in theft allegations. Respondent terminated both Complainants' employment for

suspected theft on January 8, 2003.[1] Other employees were terminated for theft. It is unknown if they too were Mexican.

Homoly's Harassment

As per Complainant Posada's testimony, his claim of harassment was made up of the following statements attributed to Homoly:

1. According to Posada's testimony, in July 2002, he and other employees from Respondent's warehouse area, overheard Homoly say to another person, "...all Mexicans are thieves," and "He (Homoly) didn't understand why Mexicans were there when they did not speak the language."

2. According to Posada's testimony, in August 2002, Posada, while operating a forklift in Respondent's monthly party, Posada overheard Homoly say, "He (Homoly) couldn't understand why the company employed us."

3. In November 2002, Complainant Posada and other employees, during Respondent's monthly party, overheard Homoly, who was standing 5 to 6 feet away, state, "...Mexicans were thieves and why didn't Mexicans speak fucking English."

4. From July through December 2002, during Respondent's monthly parties and in hearing range of Complainant Posada and other employees, 5 or 6 feet away, Homoly stated, "...all Mexicans are thieves."

As per Complainant Ramirez's testimony, his claim of harassment was made up of the following events attributed to Homoly:

1. In July 2002, Complainant Ramirez and other employees, during a company party, overheard Homoly say to "other bosses from shipping," "Those Mexicans don't speak English, but they do know how to steal."

2. In August 2002, Complainant Ramirez, while working his forklift, overheard Homoly

[1] The only issue before the Commission is Complainants' claim for harassment based on their national origin.

say to his secretary, "...He (Homoly) didn't know if they (Mexicans) have something against us." Homoly also ceased greeting Complainants and would "glare" at them.

Tyminski's Harassment

Complainant Posada testified that harassment attributed to Tyminski was from August 2002 through the end of October 2002. Complainant said that on a monthly basis, Posada heard Tyminski declare before all the workers present, "Why don't you learn English!" Each of the four times, Tyminski peppered those declarations with, "Mexican Mother Fuckers!" and "Mother Fuckers!"

In August 2002, Complainant Ramirez heard Tyminski twice declare to his fellow workers, "Stupid Mexicans!" At the end of September 2002, Ramirez testified that he heard Tyminski say on one occasion, "Fucking Mexicans!"

The October 2002 Meeting

In October 2002, Complainants plus another employee, "Ancelmo," lodged a verbal complaint to their immediate supervisor, Terry Tully, about Cherisse Tyminski, the receiving clerk. A meeting took place in October 2002, and was attended by the three employees and Tully. Tully testified that the impetus of the meeting and cause of the complaint was that Tyminski was too "bossy." Complainants' testimony was that the meeting was requested to discuss Tyminski's derogatory remarks. However, all parties agreed that after the October 2002 meeting, Complainants had no further complaints about her.

DISCUSSION

Number of Mexican Employees at Respondent

Respondent submits that between January 2002 through January 2003, the department where Complainants worked consisted of eleven employees and nine were Hispanic. This fact alone does not cleanse discriminatory behavior. "It is often the case that certain types of jobs will be accepted more readily by new immigrants than by U.S. citizens. The fact that an employer will hire those immigrants does not mean that there is no resentment of the new

workers' foreign national origin. In fact, the very presence of so many individuals of a particular national origin, speaking a foreign language, may cause resentment in certain individuals." Palka and ISS International Service System, Inc., IHRC, ALS Nos, 2369 and 2668, July 12,1995, aff'd, ISS International Service System, Inc. v. Illinois Human Rights Commission, 272 Ill.App.3d 969, 651 N.E.2d 592 (1st Dist. 1995)

Supervisory Status and Employer's Liability

James Homoly

The parties do not dispute that James Homoly, Respondent's Director of the Rohlwing Distribution Operations and Corporate Facilities, was a supervisor as defined by the Act. As such, Respondent is strictly liable for any harassment caused by James Homoly. 56 Ill. Admn. Code 5220.900 (c).

Cherisse Tyminski

The parties disputed Cherisse Tyminski's supervisory status with Respondent. Cherisse Tyminski, who worked at Respondent since 1995, first on the shipping line, and in 2002, as the "shipping and receiving clerk." Complainant Posada called Tyminski a "co-worker" and denied she was his supervisor. Complainant Ramirez identified Tyminski as a "secretary." Tully, her supervisor, called her a "receiving clerk" who had the "authority to check on the accuracy of shipments and inventory." Tyminski, according to Tully's testimony, did not have authority to instruct or relay orders to the workers. Tyminski added that she "scheduled trucks" and "checked shipping and receiving."

Countering, Complainant Posada testified, "When the supervisor (Tully) was not present, she (Tyminski) would tell us what to do." But when Posada was asked to explain his statement, he replied, "... I had to bring to her the papers so she could order for the labor." Posada also testified that "the lead man gave orders."

Tyminski, admitted she "interacted" with the forklift drivers and "asked them to do things." These "things," Tyminski explained, were what the forklift drivers "... really (didn't) need to be told ...," (as it was part of their) "position."

Once Complainants perceived Tyminski "overstepping her bounds and acting in a way that she was their boss," she was stopped by both the employees and her supervisor, Tully. After the October 2002 meeting with Tully, which was called by the employees, including Complainants, Tyminski's behavior was no longer considered an issue by Complainants, either as discriminatory or "bossiness."

What authority must one possess before she is considered a supervisor? In Valentine v. City of Chicago, 452 F.3d 670 (7th Cir.2007), the victim's immediate supervisor, a man who could merely transfer employees, had day to day dealings with both the victim and harasser. He represented to the victim that he would "take care of the problem" on 10 separate occasions. As a result, the plaintiff had a reasonable belief that he was her supervisor, even though he could not independently hire, fire or discipline other employees. That person had enough apparent authority to give him the status of a "supervisor."

In Bombaci v. Journal Community Pub Group, Inc., 482 F.3d 979 (7th Cir.2007), the plaintiff alleged that a person whose duties were limited to making work assignments and recording the department's sick or vacation time was a supervisor. The court disagreed and described the tasks as "secretarial" in scope. Therefore, the plaintiff offered no reasonable evidence to support her belief that this person was her supervisor. In any event, there were other true "supervisors" known to, and available to, the plaintiff and the company's harassment policy had a "point person" for employees' complaints.

The Complainants in this case are more like the plaintiff in Bombaci than in Valentine. In fact, contrary to the facts in Valentine, Complainants refused to acknowledge Tyminski as their supervisor. Posada described Tyminski as a "co-worker" while Ramirez called her a "secretary." Instead of relying on Tyminski for assistance as in Valentine, the Complainants

challenged her behavior, either because she was too "bossy" as contended by the Respondent or because she used derogatory slurs as alleged by the Complainants. Tully was acknowledged by the Complainants as the forklift drivers' immediate supervisor, and they contacted him when they thought they had a problem with Tyminski in October 2002.

Tyminski duties were "secretarial in scope" as per Bombaci. All forklift drivers were responsible for bringing Tyminski "papers." Tyminski was to check the accuracy of shipments.

The Complainants failed to prove by preponderance of the evidence that Tyminski acted in the capacity of a supervisor as defined by the Act. Therefore, Tyminski is a co-employee and not a supervisor as defined by the Act.

Co-employee Harassment and the October 2002 Meeting

"With respect to conduct between fellow employees, an employer is responsible for acts of harassment, in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, becomes aware of the conduct, and fails to take immediate and appropriate corrective action." 56 Ill.Admin.Code 5220.900(d) and Section 2-102 (D) of the Act.

If the harasser is a co-worker as in this case, the Complainants must show that the company was negligent in protecting the employee. "What does matter is how the employer handles the problem..." Erickson v. Wisconsin Department of Corrections, 469 F.3d 600 (7th Cir. 2006). Complainants did not provide evidence that the Respondent failed to take reasonable corrective action after learning of their allegations. Once Complainants informed Tully, their immediate supervisor, Tully took corrective measures in promptly holding a meeting with the Complainants and another employee and spoke effectively to Tyminiski. All issues were resolved. There can be nothing as fast, immediate and effective as the solution reached at the October 2002 meeting. Complainants testified that no further problem arose between them and Tyminski with either her behavior or her bossiness after the meeting took place. Like in Romero and International Paper Company, IHRC, ALS No. 09-0094, May 20, 2009, Complainant did not

provide evidence that the Respondent failed to take corrective action after learning of the Complainant's allegations.

Therefore, Respondent complied with its obligation under the Act, and no liability exists as it relates to the claim against Tyminski.

Target Area and Context of the Statements

Homoly's Harassment

"All Mexicans are Thieves"

During the public hearing, Complainants testified as to national origin harassment by Respondent's director, James Homoly. On each occasion Complainants overheard Homoly's comments during Respondent's monthly employee parties or in its warehouse area.

Respondent, without reservation or qualification, denied that any derogatory remarks alleged by Complainants were uttered by either Homoly or Tyminski. Respondent did not contend the alleged statements were misconstrued, taken out of context or exaggerated. Through the totality of the circumstances analysis, the facts could prove to be neutral or they could reach the range of severity, number and pervasiveness that would result in liability. Village of Bellwood Board of Fire and Police Commissioners, supra. The burden of proof is with the Complainants.

Respondent contends Complainants' allegations of harassment took place in a public forum, and that, if spoken, were merely overheard by Complainants, not directed to them. The first step is to discuss "second-hand" remarks in a national origin harassment claim and if these comments were in fact "second hand."

"The impact of 'second-hand' harassment is obviously not as great as the impact of harassment aimed at the plaintiff." Yuknis v First Student, Inc, 481 F.3d 552 (7th Cir.2007); Gleason v. Meserow Fin, Inc., 118 F.3d 1134, (7th Cir. 1997). Although discussing a sexual harassment case, Yuknis is helpful as it discussed the offending work place comments by "context" and "target area." Despite Complainant being "deeply offended," he or she must be in

the "target area to the offending conduct." For example, if a comment was aimed at women or African Americans, but the person who heard the comment was a white male, he would not be considered in the "target area." There need not be "intent" to cause offense, but it must be the kind of conduct that makes the workplace "hellish" for those whom Title VII (and the Illinois Human Rights Act) protects, as opposed to "cat lovers..., people offended by adultery, for gamblers, and for fastidious people, who abhor foul language." Id.

The "context" of the given comment or conduct "may be critical to determining the object of hostility." Was the Complainant the direct or indirect recipient of the harasser's conduct, or did he/she have only a "tangential intersection with the Plaintiff?" Id. "The more remote or indirect the act claimed to create a hostile working environment, the more attenuated the inference that the worker's working environment was actually made unbearable." Id.

Just because it was rumored that a manager watched porn on his computer, or at home for that matter, the Yuknis court asks what business it was of the plaintiff. And if the basis of an action was merely remarks or behavior "unrelated to the complainant except for his having overheard, or heard of, them," then the American workplace would be a "seething cauldron" peppering the employer, courts and Commission with complaints.

Complainants were the "target area" despite the fact that the comments were being overheard. Complainants are from Mexico. Homoly, who had the authority to terminate the Complainants in this case, as the director of the facility, allegedly declared that Mexicans are thieves. The testimony indicates that there was no person of higher corporate rank regularly in the office where they worked than Homoly. Here, the "target area" of the alleged declaratory statements is "Mexicans," and the Complainants were in Homoly's target class as that was their national origin. Homoly's veiled threats and his belief that Mexicans lack integrity was communicated loud and clear to the focus of his remarks. Homoly did not have to go up to every Mexican in Respondent's employ and individually state that all "Mexicans are thieves." Homoly's pronouncements, which could be heard over 5 to 6 feet, over music and party chatter,

were broadly cast, broadly heard, broadly understood and threatening to his target area, Mexicans.

If the comments "All Mexicans are thieves" met the target group, were they derogatory in nature? Yes.

In Barrera and Lakeside Building Maintenance, IHRC, ALS No.11023, August 1, 2001, Complainant alleged that his operational manager, several times a week, for 7 months, would assert to him that "Mexicans were lazy and too slow." The manager would also "yell and scream" at the Complainant and generally treat him differently than non-Mexican employees. Although the Commission found the Complainant's testimony incredible, it is helpful to know that the Commission described the manager's comments as "slurs" and "racial epithet" and "racial slurs." Thus, just as the remark, "Mexicans were lazy and too slow" was considered derogatory by the Commission, then the remark alleged in this case, "Mexicans are thieves," also made that category and distinction.

Target Area and Context of the Statements

Homoly's Harassment

"All Mexicans should speak English"

Complainants also alleged that Homoly's overheard comment that Respondent's Mexican employees should speak or learn English is more difficult to interpret and analyze. The remark is reviewed in its context.

Posada admitted he knew a "little English," and Ramirez "knew (English) words." Tyminski, as Complainants' clerk, gave them more linguistic credit as she talked with Complainants about employment tasks on a daily basis, in English, and socialized with them after working hours. Complainants also talked with Tully without a translator, and understood Homoly's remarks which he said in English. Complainants knew and worked with Homoly since 1996 and 1997, they thought he was "nice," they received good evaluations and consistent raises up to 2002. So are Complainants in the "target area" concerning the second group of

overheard comments: Mexicans who can not speak English? The overheard comments, while offensive to the Complainants, were not directed to them as they were overheard or described them, as they knew enough English to satisfactory perform their duties, grieve their complaint and socialize.

A second point of analysis is the subject matter itself. Employees do not leave social discourse outside the factory's gate. The comment that "Mexicans should learn English" is as contemporary and controversial as "American's should learn Spanish." Although an improper generalization, the remark may not be derogatory, unless shown otherwise by placing it in context in which the comment was said. Complainants only testified that they overheard it; therefore, the record is devoid of facts explaining the context of the comment.

In Davies and Seguin Services, Inc., IHRC, ALS No. 8977, April 17,1997, it was stated that "...black individuals get low scores on the graduate admission test." It was assumed to be a slur for purposes of motion to dismiss, but even though it was a co-worker's isolated, insensitive remark, it was not actionable harassment. The Commission discussed the "context" of the statement.

Even if an employee spoke and understood English well enough to perform their tasks satisfactorily, but had an accent, a supervisor with a biased mind set, could make that same remark, "Why don't Mexicans learn English," to revealed his negative stereotypical bias against them.

In Hill and Peabody Coal Company, IHRC, ALS No. 6895, June 26, 1996, the term "niggerhead" was used in front of an African-American employee. The term had been used for hundreds of years in the coal mining industry and was meant to describe sulfur balls. After the employee objected to the mining term, the company stopped the use of it. "We do not condone its usage, regardless it was an industry practice, as the respondent contends. However, we must examine the term's origin in order to evaluate whether use of the term constitutes racial harassment." As the term was used only twice, not directed at the Complainant, but used as a

mining term, it failed to rise to the level of harassment. However, the Commission's decision may have been different if the company continued the use of the term in its traditional meaning, but directed it at the African-American employee.

Therefore, even though the comment is neutral on its face, it could be used in a derogatory fashion. Here though, Complainants failed to show by the preponderance of the evidence the "context" of the overheard statement and that they were in the "target area." Also, the number of times Complainants were subjected to substantiated and overheard comments, as well as their credibility, will be discussed below.

"Steady Barrage"

Even if the comments and remarks allegedly used by Homoly were derogatory, were there enough of them to be considered a "steady barrage?"

In Bridges and Comfort Inn/Peddlers Inn, IHRC, ALS No. 2374, March 29, 1989, for approximately two months, the hotel manager addressed the complainant directly by threatening to "cream his black ass," "fire his black ass" and on several occasions told him to "get off his black ass" and similar phrases using "black ass" and "you people." In The Village of Bellwood Board of Fire and Police Commissioners, supra, Plaintiff also suffered a "continuous stream of derogatory comments in one form or another," including slurs, derogatory materials circulated around the department on a regular basis, and offensive cartoons routinely tacked on bulletin boards.

However, in Ezife and Metropolitan Water Reclamation District of Greater Chicago, IHRC, ALS No. 11089, August 15, 2003, Complainant was subjected to two offensive remarks, "I'll write anything about your black ass and they'll believe it." And, "I will bang your black ass any chance I get," but the remarks "fail to rise to the level of actionable racial harassment." In Brown and American Highway Technology, IHRC, ALS No. 10805, January 2, 2003, two racial slurs in a three week period was not actionable. And, in Jackson and College of Lake County-

District No. 532, IHRC, ALS No.11325, August 2, 2002, the Commission bluntly stated, "two incidents do not create a hostile work environment."

"Clean Lanugage"

Complainants point out that Homoly used the expletive "fucking" prior to the word "English," and Tyminski said, "motherfucker," however; there is "no clean language act." Scott v. Sears, Roebuck & Comp., 798 F.2d 210 (7th Cir. 1986). The issue is not unprofessionalism, but harassment. State v. Human Rights Commission, 178 Ill.App.3d 1033, 534 N.E.2d 161 (4th Dist. 1984), citing, Baskerville v. Collegian, 50 F.3rd 428 (7th Cir. 1995).

This point should not be confused with the allegation of Tyminski's use of the slur "Mother Fucking Mexicans," as discussed above.

"Glaring"

Complainants also alleged in their subjective determination that Homoly's "glaring" or "monitoring" is discriminatory. However, Complainants failed to show causality between the glare and illegal harassment. The Complainants admitted in their testimony that Respondent had an issue with theft of its product, and they were suspected. To glare, without more, is not discriminatory or a negative employment action.

CONCLUSION

Ramirez

Although both Complainants' cases were consolidated, each one of Complainants' cases must stand on its own merit.

During his testimony, Complainant Ramirez testified that he only overheard Homoly make two derogatory remarks. The first took place in July 2002 when Ramirez and other employees were present at Respondent's monthly party. There, Complainant overheard Homoly say to "other bosses in shipping," "Those Mexicans don't speak English, but they do know how to steal." Complainant Ramirez did not add Complainant Posada as a witness to this event during his testimony.

Secondly, in August 2002, Complainant Ramirez testified that while working his forklift, overheard Homoly say to his secretary, "...He (Homoly) didn't know if they have something against us." No witness appeared at the public hearing to substantiate or to corroborate either event testified to by Ramirez. In any respect, even if these two remarks were presumed to be derogatory, "two incidents do not create a hostile work environment." Id.

Therefore, Ramirez failed to present the preponderance of the evidence necessary to show that the harassment was severe and pervasive enough to alter the conditions of his employment and create a hostile and abusive working environment; his Complaint should be dismissed with prejudice.

Posada

If Complainant Cesar Posada's testimony was to be presumed to be credible, which it is not, he was in the "target area" of at most six overheard derogatory slurs from Homoly during a five month period. The repetitious, "all Mexicans are thieves" or to that effect, took place, like clock work, at Respondent's monthly party, while standing 5 -6 feet away from the Complainant, July through December 2002.

The context of Homoly's two other overheard comments as to Respondent's Mexican employees learning to speak English were not shown by the preponderance of the evidence by Complainant to be derogatory as discussed above.

Finally, the last minute revelation by Complainant about an additional remark that took place in the warehouse in July August by Homoly is discarded as incredible, because of the timelines of his recall.

Therefore, Complainant Posada failed to present the preponderance of the evidence necessary to show that the harassment was severe and pervasive enough to alter the conditions of his employment and create a hostile and abusive working environment.

CREDIBILITY

Determination of what actually happened at the Rohlwing Distribution Center between July through December 2002, is a "credibility determination," which is normally at the "heart of any harassment case." Camden and AAA-Chicago Motor Club, IHRC, ALS No. 1194, April 4, 1986. However, the burden of proof remains with the Complainants to show harassment.

Complainants worked at Respondent successfully for an estimated 6 or 7 years before their harassment claims began in July 2002. Prior to Complainants' separation from employment, they earned satisfactory performance evaluations and raises in salary. Homoly, Tully and Tyminski were not strangers to them. Homoly was considered "nice" and Tyminski even socialized with Complainants on occasion after work. The Complainants were comfortable enough with Tully as their supervisor to discuss work related problems as exemplified by the October 2002 meeting. The change of amiable atmosphere came when Respondent investigated the theft of its products. Both Complainants were suspected of theft and eventually they were discharged. Also, Complainants' charge of harassment did not occur until after their separation from employment. It is reasonable to infer that Complainants had retaliatory motive, especially without corroborating testimony.

Complainants failed to take advantage of the numerous witnesses who allegedly overheard the numerous, broad and public derogatory slurs spoken by Respondent's director and receiving clerk. Complainants had a third person, Ancelmo, who participated in the October 2002 meeting. Complainants had a broad pool of potential witnesses to choose from. The Complainants could be witnesses for each other, although a party is not a disinterested witness.

Any witness could have added much to their claim.

Third, Posada's epiphany on the stand during the public hearing that there were two additional harassing events involving Homoly located at the warehouse is incredible. This new testimony came after all this time and without supplementing his discovery responses.

On the stand, both Complainants sounded repetitive and rehearsed.

On the other hand, Respondent produced three key witnesses, who were no longer current employees, Tully, Homoly and Tyminski, whom I find credible, for the most part.

After taking of all testimony and exhibits into account, Complainants have failed to show, by the preponderance of the evidence that, as a result of their national origin, Mexico, they were forced to endure harassment.

RECOMMENDATION

Based on the forgoing analysis, I recommend that the instant Complaint and underlying Charges be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: July 26, 2010